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A Wrong Still in Search of a Remedy: Educational Adequacy after Sheff v. O'Neill

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NOTE

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In 1989, fourth-grader Milo Sheff and seventeen other schoolchildren sued the state of Connecticut to eradicate the segregated conditions in Hartford public schools.[1] Although Connecticut had not intentionally segregated racial and ethnic minorities in Hartford schools,[2] a state statute provided for district boundaries coterminous with city boundaries,[3] leaving fourteen of Hartford's twenty-five elementary schools with a white-student enrollment of less than two percent.[4] The Con-

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1. *See* Sheff v. O'Neill, 678 A.2d 1267, 1271 (Conn. 1996). The plaintiffs filed a four-count complaint alleging that racial and socioeconomic isolation burdened the students with "severe educational disadvantages." *Id.* Specifically, the first two counts of the complaint alleged that by implementing and maintaining "racial and ethnic segregation between Hartford and the surrounding suburban public school districts," the state failed its constitutional obligation to provide students with "an equal opportunity to a free public education." *Id.* The third count alleged that because the Hartford students were "severely educationally disadvantaged" by comparison to the surrounding schools, the state had failed "to provide a minimally adequate education for Hartford schoolchildren." *Id.* at 1271-72. The court did not address the merits of this count, finding that "the plaintiffs' remedial claims did not depend upon the validity" of that claim. *Id.* at 1286. For a detailed discussion of the court's decision, see *infra* notes 126-138 and accompanying text.

2. *See Sheff*, 678 A.2d at 1274. Except for an incident in the mid-1800s, the court found that there was no evidence that the state of Connecticut ever condoned de jure segregation. *See id.*

3. The plaintiffs specifically challenged statutes that established the borders of school districts to coincide with municipal borders and required all children to attend school within the district where they lived. *See id.* at 1277-78.

4. *See id.* at 1273. The parties stipulated that while minority groups accounted for 25.7% of the statewide student population, 92.4% of the students in the Hartford public school system were black or Latino. *See id.* at 1272-73. Within this population, a majority of the children came from economically dis-

necticut Supreme Court found that the state, through its districting statute, was "the single most important factor contributing to" the segregated conditions in Hartford's public schools,[5] in spite of affirmative attempts to combat racism in the schools.[6] The court accepted the findings of the trial court, however, that "poverty, and not race or ethnicity, is the principal causal factor in the lower educational achievement of Hartford students."[7] Nonetheless, the court determined that the existence of extreme racial and ethnic isolation in the public school system deprived schoolchildren of a substantially equal educational opportunity and required the state to take further remedial measures.[8] It declined to specify the necessary relief, however, instead leaving such a determination to the state legislature.[9]

Sheff v. O'Neill is a landmark desegregation case. The stark residential and educational segregation experienced by Hartford schoolchildren reveals the shortcomings of federal desegregation efforts,[10] while the Connecticut Supreme Court's judicial response indicates the potential scope of state-constitutional education guarantees.[11] Though courts have held state actors liable for school segregation where underlying residential segregation reflects discriminatory public sentiment,[12]

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advantaged homes headed by a single parent where English was a second language. *See id.* at 1273. The court found that these socioeconomic factors impaired the children's attitude toward learning and adversely affected scores on standardized tests. *See id.*

5. *Id.* at 1274. The court found the state to be the "single most important factor" despite the trial court's finding that personal geographic preferences had contributed to the racial imbalances present in the Hartford schools. *See id.* at 1278 n.24.

6. The court noted that the state had undertaken various civil rights initiatives beginning in 1905, and that during the 1980s, the state board of education reorganized in an effort to more adequately respond to the needs of urban schoolchildren. *See id.* at 1274. The strong correlation between residential and educational segregation impedes, however, such efforts. *See infra* notes 26-42 and accompanying text (discussing how racial segregation concentrates poverty and precludes educational achievement).

7. *Sheff*, 678 A.2d at 1274.

8. *See id.* at 1290-91. The court noted that the absence of a constitutional remedy for poverty should not preclude relief for racial and ethnic segregation. *See id.* at 1287-88.

9. *See id.* at 1290. The court also failed to specify a timeline, instead directing "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas." *Id.*

10. *See infra* part I.B (providing an overview of federal desegregation efforts).

11. *See infra* part I.C (discussing litigation predicated on state-constitutional guarantees of public education).

12. *See, e.g.*, United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276,

and though some school districts have successfully employed housing remedies in response to school desegregation orders,[13] no court has explicitly recognized that the interrelated and reinforcing nature of residential and educational segregation require housing remedies, irrespective of invidious discriminatory intent.[14] The continuing failure to realize the promise of *Brown v. Board of Education*[15] in Northern cities like Hartford made *Sheff* an appropriate case in which to develop a broader remedial framework. Yet while the *Sheff* court resurrected the profound but nearly abandoned insight of *Brown* that racially segregated schools are "inherently unequal,"[16] its reasoning failed to compel remedial solutions capable of realizing the goals of integration.[17]

This Note offers an alternative line of reasoning, predicated on existing housing and education law, that would mitigate negative remedial and precedential implications of the *Sheff* decision. It contends that state-constitutional Education Clauses independently mandate educational adequacy, and by extension, integration, thus necessitating wide-ranging remedial action. Part I discusses the history of desegregation law, emphasizing that poverty, race, and educational segregation intersect to isolate minority communities from opportunity structures. Part I also outlines the state-constitutional basis

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1537 (S.D.N.Y. 1985) (holding that through control of the local school board and discriminatory housing practices, the city had intentionally fostered the creation of highly segregated schools).

13. *See infra* note 38 (noting that successful remedial programs alter perceptions concerning school quality).

14. *See* john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 766 n.67 (1996) ("I do not know of any case where courts have looked at housing segregation by first looking at the ['unintentional' segregation of] schools."). The *Yonkers* holding of "intentional" segregation, for instance, required 125 depositions and a 625-page opinion to connect racist sentiment with correspondingly acquiescent policies. *See* Michael H. Sussman, *Discrimination: A Unitary Concept*, 80 MINN. L. REV. 875, 888 (chronicling the discovery process in Yonkers, 624 F. Supp. 1276 (S.D.N.Y. 1985)).

15. 347 U.S. 483 (1954).

16. *Id.* at 495.

17. The term "integration" carries a connotation very different from "desegregation." "Integration" connotes transformation of racial hierarchy by exposing members of the dominant culture to different perspectives. "Desegregation" suggests a right subject to constraints, rather than a benefit to the entire community. *See* powell, *supra* note 14, at 782-85 (citing DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 219-20 (1993)); *cf.* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1913-15 (1994) (offering similar distinction between "cultural desegregation" and "classic integration").

for educational adequacy suits. Part II examines the utility of existing approaches, including fair-share housing suits, for achieving long-term racial integration. Part II also discusses the legal and remedial ramifications of the *Sheff* court's reasoning. It argues that construing the fundamental right to an education to confer a correlative right to an abstract "equal educational opportunity" permits too much legislative discretion and undermines the holding's precedential value. Part III offers an alternative line of reasoning that identifies integration as a precondition of educational adequacy, thereby compelling housing remedies as an antidote to pervasive segregation.

I. THE CONTEXT OF *SHEFF V. O'NEILL*: HYPERSEGREGATION, THE FEDERAL INTENT STANDARD, AND THE THEORY OF ADEQUACY

In the past fifteen years, the overall trend in housing and education has been toward an incremental desegregation.[18] In the urban North, however, the trend has been away from integration, and toward increased segregation on the basis of race and socioeconomic status.[19] The strong correlation between

18. *See* James S. Liebman, *Desegregating Politics: "All-Out" Schools Desegregation Explained*, 90 COLUM. L. REV. 1463, 1467-68 (1990) (providing statistical evidence of increasing integration in some regions); Steven G. Rivkin, *Residential Segregation and School Integration*, 67 SOC. OF EDUC. 279, 281 (1994) (providing statistics indicating increased integration in most regions of the country).

19. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 222 (1993) (noting that in 1990, more than 75% of blacks in urban northern areas would have to move to different neighborhoods in order to achieve even distribution throughout the metropolitan area). Residential segregation among blacks in major American cities, as measured by the redistribution that would need to occur in order for each neighborhood to replicate the racial composition of an entire city, increased steadily from relative integration at the turn of the century to "hypersegregation," or extreme isolation, by 1980. *See* Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 798 (1996) (defining "hypersegregation" as a high degree of segregation along any four of the following five dimensions: uneven distribution across neighborhoods; high isolation within racially homogenous neighborhoods; clustered neighborhoods forming contiguous ghettos; centralization away from suburban communities and opportunity structures; and relative population and geographic density).

Segregation resulted in part from the large influx of blacks into northern cities from the rural South and the subsequent exodus of middle-income whites, who were attracted by low density, cheap home mortgages, and low tax rates. *See* DAVID RUSK, CITIES WITHOUT SUBURBS 5-8 (2nd ed. 1995) (describing the transformation of urban populations); John Charles Boger,

spatial isolation and school quality has inevitably led to a resurgence of litigation attacking disparities in educational quality between urban and suburban schools.[20] While the Supreme Court's refusal in *San Antonio Independent School District v. Rodriguez*[21] to recognize a fundamental right to education[22] foreclosed challenges to property tax-based financing systems on equal protection grounds,[23] state constitutions have provided alternative bases for bringing suit.[24] State court attempts to redress educational disparities continue to ignore, however, the crucial role that racial segregation plays in producing and maintaining poverty.[25]

Race and the American City: The Kerner Commission in Retrospect—An Introduction, 71 N.C. L. REV. 1289, 1298 (1993) [hereinafter Boger, *Race and the American City*] (noting that while 70% of America's metropolitan population resided in central cities in 1950, by 1990 that number had fallen to 40%). The equation of "good" schools and "good" neighborhoods with "white" schools and "white" neighborhoods also contributed to "white flight." *See* ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 29 (1994); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1661 (1995) ("For whites, residential segregation is one of the forces giving race a 'natural' appearance: 'good' neighborhoods are equated with whiteness, and 'black' neighborhoods are equated with joblessness.").

20. *See* William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REFORM 481 (1995) (providing a social context for adequacy suits).

21. 411 U.S. 1 (1973).

22. *See id.* at 54-55.

23. *Rodriguez* did not foreclose the possibility of a right to some minimal level of educational adequacy under the Federal Constitution. *See id.* at 37 (suggesting that a system that completely shuts out some children may violate the Equal Protection Clause); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 131 (1995) (stating that the right to a minimally adequate education remains an open question under *Rodriguez*). Nonetheless, the majority Justices in *Rodriguez* made it clear they were unlikely to revisit the question. *See* 411 U.S. at 59 (stating that "the ultimate solutions . . . must come from the lawmakers and . . . those who elect them").

24. *See infra* notes 70-81 and accompanying text (defining scope of fiscal-equity and adequacy suits and outlining structure of state-constitutional education provisions).

25. Because of the strong correlation between residential segregation and educational segregation, it is difficult to integrate schools in cities where few whites remain in the school system. *See* Denton, *supra* note 19, at 795-96, 801 n.27 (1996) (observing that continuing preeminence of neighborhood school model of public education coupled with increasingly segregated neighborhood patterns severely limits the potential for integration of inner-city schools); Rivkin, *supra* note 18, at 279 (citing Atlanta, Chicago, New Orleans, Newark, and Washington, D.C., as cities where less than five percent of the student population is white). Professor Rivkin has observed that because of changes in urban populations, racial isolation can only be significantly reduced through the use of "interdistrict integration programs or changes in housing

A. THE NEXUS OF RACISM, SEGREGATION, AND POVERTY PRODUCES INADEQUATE EDUCATIONAL OPPORTUNITIES FOR URBAN BLACKS

Commentators have attributed black poverty in the United States to residential segregation and isolation from opportunity structures.[26] According to empirical studies, systematic

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patterns." *Id.* at 285.

26. "Opportunity structures" refer to the panoply of advantages, such as "work support networks (car pools, informal job information networks), institutions (good schools and training programs), and systems (child care and transportation) that most of the employed population in this country rely on." WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 51 (1996) [hereinafter WILSON, WHEN WORK DISAPPEARS]. For a discussion of the various barriers to opportunities, see *id.* at 51-86. *See also* John P. Blair & Rudy H. Fichtenbaum, *Changing Black Employment Patterns*, *in* THE METROPOLIS IN BLACK & WHITE: PLACE, POWER AND POLARIZATION 72 (George C. Galster & Edward K. Hill eds., 1992) (discussing unemployment rates among blacks and concluding that blacks are "last hired, first fired" and remain completely barred from some important occupations); Phillip L. Clay, *The (Un)Housed City: Racial Patterns of Segregation, Housing Quality and Affordability*, *in* THE METROPOLIS IN BLACK & WHITE, *supra* at 93-104 (providing statistical evidence to support the conclusion that blacks are disproportionately burdened by a lack of affordable housing and a concomitant deprivation of the services and amenities commonly associated with quality housing); Edward W. Hill & Heidi Marie Rock, *Race and Inner-City Education*, *in* THE METROPOLIS IN BLACK & WHITE, *supra* at 108, 124 (concluding from statistical survey that the poor quality of inner-city education is "built on a foundation of racial *and* class isolation"); John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1575-76 (1993) [hereinafter Boger, *Fair Share*] (observing that segregation confines large numbers of blacks to economically inferior and socially underserved communities); Mahoney, *supra* note 19, at 1659 (emphasizing that isolation from opportunity structures influences the construction of racial stereotypes); powell, *supra* note 14, at 758 (noting that residential segregation includes not only isolation from people of a different race, but also from opportunity structures such as education, health care, and jobs).

The Kerner Commission Report in 1968 predicted that patterns of white migration to the suburbs would result in serious economic disadvantages for the urban black population. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 21-29 (1968). This prediction has proven true, as trends in job growth have isolated urban minorities from opportunity structures. *See* James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1520-21 (1993) (citing statistics showing that large numbers of employers have left the cities for the suburbs). In the education context, this isolation impacts students' self-perception and contributes to low achievement levels by inculcating in students a sense that they lack "destiny control." *See* Boger, *Race and the American City*, *supra* note 19, at 1299. In the aggregate, these various forms of social isolation combine to form what Professor Wilson has termed "concentration effects," in which the lack of access to job networks, quality schools, and other opportunity structures places entire urban ecological niches at an enormous social disadvantage. *See*

exclusion from integrated neighborhoods and accompanying socioeconomic advantages does not result from natural forces; public and private discriminatory practices impose them on urban blacks.[27] Neither relative affluence[28] nor preferences[29] play a significant role in the continuing residential segregation among blacks.[30] Empirical evidence shows that race is the primary determinant in residential segregation of blacks and a unique barrier to socioeconomic assimilation.[31] Sociologists have dem-

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WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 58-61 (1987) [hereinafter WILSON, THE TRULY DISADVANTAGED].

27. Persistent segregation can be explained only by illegal housing discrimination and white bias against integrated neighborhoods. *See* Boger, *Fair Share*, *supra* note 26, at 1577-78 (citing empirical evidence of both phenomena). Although disagreement exists concerning the extent to which overt racism maintains segregated conditions, *see* Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1610 n.49 (1995) (citing conflicting findings), there can be little question that overt discrimination produced the entrenched segregation present in urban areas today, *see id.* at 1612-14 (citing the practice of "redlining" in private and governmental mortgage lending policies as a contributing factor in the creation of the urban ghetto).

28. *See* John O. Calmore, *To Make Wrong Right: The Necessary & Proper Aspirations of Fair Housing*, *in* THE STATE OF BLACK AMERICA 1989, at 94-95, 97 (1989) (noting that levels of segregation among blacks do not correspond significantly to educational attainment or affluence).

29. Limitations on the ability of blacks to gain access to more affluent neighborhoods are unrelated to preferences. *See* Boger, *Fair Share*, *supra* note 26, at 1577 (citing surveys showing that black preferences are for integrated neighborhoods). By contrast, white preferences are for black populations of less than 20%. *See* MASSEY & DENTON, *supra* note 19, at 93 (citing studies of residential preferences). Though support for integrated schools is more widespread, there remains a significant gap between black and white preferences. *See* Larry Tye, *Poll Shows Wide Support Across U.S. for Integration*, BOSTON GLOBE, Jan. 5, 1992, at 15, *cited in* powell, *supra* note 14, at 761 n.44 (reporting a willingness to employ busing to achieve integration in 79% of blacks and 48% of whites). *But see* DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 7.6.4 n.26 (3rd ed., 1992) (citing surveys showing black disillusionment with desegregation programs requiring busing).

30. *See* Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 885-88 (1988) (citing evidence of persistent segregation despite affluence and preferences for integrated neighborhoods); *see also* Denton, *supra* note 19, at 801-05 (discussing "myths" used to explain the persistence of segregation among blacks). *But see* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 127-46 (1995) (arguing that a combination of relative impoverishment and preferences explain the high degree of minority segregation).

31. *See* MASSEY & DENTON, *supra* note 19, at 85 (suggesting that discrimination is the most significant factor in residential segregation). *But see* ARMOR, *supra* note 30, at 146 (concluding that minority preferences are the

onstrated that, once in place, residential racial segregation effectively perpetuates socioeconomic deprivation by preserving significant levels of spatial isolation and absolute poverty.[32]

Poverty, segregation, and racism intersect to form a seemingly intractable cycle of social pathologies. Public policy experts have observed that extreme isolation generates "concentration effects,"[33] including the creation of an "oppositional culture" characterized by a rejection of middle-class norms for work, speech, education and marriage.[34] Researchers note that the confluence of high poverty and extreme isolation produce a climate of hopelessness, causing black cultural values to diverge from white middle-class norms.[35] These

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strongest explanatory factor in segregated housing and discrimination the least significant); *cf.* Johnson, *supra* note 27, at 1638-39 (arguing that affluence signifies a degree of assimilation in blacks to the dominant culture, thereby permitting a greater degree of spatial mobility than that identified by Massey and Denton).

32. *See* MASSEY & DENTON, *supra* note 19, at 160-61 (relating high racial and economic isolation to extreme social isolation, such that many inner city residents never leave the confines of their neighborhood). In a simulation exercise, Massey and Denton demonstrate how neighborhood conditions for whites improve and those for blacks deteriorate as a city becomes more segregated by race and class. *See id.* at 118-25 (explaining "how segregation concentrates poverty"). *But see* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980, at 212-16 (1984) (suggesting that social welfare programs perpetuate poverty).

33. WILSON, THE TRULY DISADVANTAGED, *supra* note 26, at 58 (describing concentration effects resulting from the social transformation of inner cities).

34. *See* MASSEY & DENTON, *supra* note 19, at 166-68 (identifying formation of opposition culture as "a common psychological adaptation whenever a powerless minority group is systematically subordinated by a dominant majority"). As segregation and isolation becomes increasingly entrenched, admonitions to adhere to white middle class values seem "hollow and pointless." *Id.* at 170. *But cf.* MURRAY, *supra* note 32, at 221-23 (arguing that intellectual apologies for negative minority social behaviors exacerbate and encourage these patterns).

35. Massey and Denton point to the participant-observer studies of sociologist Elijah Anderson as a clear illustration of divergence in the attitudes of urban blacks from those of the white society. *See* MASSEY & DENTON, *supra* note 19, at 172-73 (citing ELIJAH ANDERSON, A PLACE ON THE CORNER (1976) and ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY (1990)). In the first study, carried out in the 1970s, poor blacks adhered to such traditional values as "hard work, honesty, diligence, respect for authority, and staying out of trouble." *See* MASSEY & DENTON, *supra* note 19, at 173. In a second study conducted in the late 1980s, similarly situated subjects exhibited "scorn and ridicule" for these same values. *See id.* Other studies demonstrate that this divergence of values exists in school children as well. *See id.* at 168, 179 (citing studies showing that black children "face tremendous pressure from their peers to avoid 'acting white' in succeeding in school and achieving academic distinction" and that rates of sexual activity and pregnancy among black teenage girls lower significantly in integrated

attitudes impact the perceptions of both blacks and whites about the desirability of urban neighborhoods and schools.[36]

Residential segregation affects access to services, including education.[37] Districting statutes drawn to coextend with neighborhood boundaries result in racially and economically segregated educational programs.[38] While educational segre-

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settings). *But see* MURRAY, *supra* note 32, at 232-35 (concluding that government programs have impeded achievement among poor minority groups).

36. *See* powell, *supra* note 14, at 781 (arguing that "negative perceptions about urban schools contribute to the unwillingness of white families to move to urban neighborhoods"). Professor powell notes that the Supreme Court acknowledged the significant impact of perceived school quality on housing choices. *See id.* at 755 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971)). The Court in *Swann* stated that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people." 402 U.S. at 20. Some courts and commentators attribute "white flight" in large part to a desire on the part of whites to avoid mandatory desegregation plans. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038, 2051 (1995) (noting that desegregation plans affect housing decisions); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 866 (1996) (discussing studies linking declining white enrollments to desegregation plans).

37. Even where only a small percentage of residents live in poverty, a high proportion of minority students attend schools experiencing conditions associated with concentrated poverty. *See* Orfield, *supra* note 36, at 860-61 (stating that schools with black and Latino populations of higher than 90% are 14 times more likely than white schools to have a majority impoverished student population). Because a school's percentage of poor children "is an extremely strong predictor of inequality in educational outcomes," *id.* at 861, and because residential and educational segregation are "inextricably intertwined," Denton, *supra* note 19, at 795, it follows that combinations of racial isolation and concentrated poverty will inhibit educational achievement. *See also* MASSEY & DENTON, *supra* note 19, at 141-42 (relating the intersection of poverty and various levels of racial segregation to performance on standardized tests); powell, *supra* note 14, at 764-65 (noting that attending racially and socioeconomically segregated schools impairs life chances and choices).

Empirical studies support these propositions. In a study of employer attitudes, sociologists found that employers equate black inner-city residency with "poor, uneducated, unskilled, lacking in values, crime, gangs, drugs, and unstable families" and made hiring decisions in accordance with these perceptions. Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 215-17 (Christopher Jencks & Paul E. Peterson eds., 1991).

38. Some courts have ordered the merger of urban and suburban school districts as part of desegregation programs. *See* Orfield, *supra* note 36, at 869-70 (discussing these kinds of court orders). Combining "the destiny of . . . metropolitan areas and their school districts" alters suburban perceptions concerning the needs of urban schools. *Id.* at 871-72; *cf. id.* at 868-69 (noting that districts which have employed housing remedies in response to desegregation orders, including successful housing programs in Louisville, Denver, and Chicago, have altered the perception of children and parents concerning the benefits of education).

gation serves as an unique impediment to black academic achievement,[39] integration appears to enhance academic performance in both black[40] and white[41] student populations. The absence of nonminority populations in urban school systems and continuing resistance to busing programs, however, limits the opportunity for achieving integrated education.[42]

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39. *See* WILSON, THE TRULY DISADVANTAGED, *supra* note 26, at 57-58 (observing that fewer than 10% of black and Latino students in segregated Chicago schools can read at the level of the national average upon graduation); Rosenbaum et al., *supra* note 26, at 1532-37 (noting that inner-city blacks attending suburban Chicago schools achieved at a higher rate than similarly situated students attending segregated inner-city schools).

40. *See* RUSK, *supra* note 19, at 123 (citing a study of Albuquerque public schools showing a strong positive correlation between test scores of public housing students and the percentage of middle-class students in the school); CHRISTINE ROSSELL & WILLIS HAWLEY, THE CONSEQUENCES OF SCHOOL DESEGREGATION 116-19 (1983) (citing 13 studies in which IQ scores of minority students increased dramatically as a result of busing programs that permitted school attendance in more affluent areas). Disparities in academic achievement between black and white students persist irrespective of equality in per-student spending. For example, despite the designation of several resegregated Norfolk, Virginia schools as "target" schools that would receive funding beyond that allocated to white schools, gaps in achievement between students in target and non-target schools widened significantly over a five year period. *See* CHRISTINA MELDRUM & SUSAN E. EATON, RESEGREGATION IN NORFOLK, VIRGINIA: DOES RESTORING NEIGHBORHOOD SCHOOLS WORK? 44 (Harvard Project on School Desegregation ed., 1994). Prior to resegregation, these same black students' scores on the Iowa Basics test improved by 20 percentage points during the three year desegregation and busing plan. *See id.* at 48; *cf.* Rosenbaum et al., *supra* note 26, at 1525 (offering explanations for instances where desegregation does not have positive effects on black students).

41. White students in some programs have performed better after desegregation. *See* MELDRUM & EATON, *supra* note 40, at 48. Moreover, there is virtually no evidence that desegregation damages white academic performance. *See* Vivian W. Ikpa, *The Effects of Changes in School Characteristics Resulting from the Elimination of the Policy of Mandated Busing for Integration upon the Academic Achievement of African-American Students*, 17 ED. RESEARCH Q. 19, 22 (1993) (discussing effect of desegregation programs on academic achievement); *see also* Jomills Henry Braddock II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY AND CHOICE, Feb. 1988, at 6-7 (discussing the relationship between desegregation and academic achievement); *cf.* Sherry, *supra* note 23, at 169 (noting correlation between black achievement on intelligence tests and proximity to white middle-class values).

42. Negative perceptions impede the potential efficacy of busing as a remedy for educational segregation. *See* Braddock & McPartland, *supra* note 41, at 5 (comparing polls showing 20% of whites and 60% of blacks favoring busing with polls showing 90% of both races favoring integrated schools); Orfield, *supra* note 36, at 866 (discussing studies that link antibusing sentiment to "white flight" by positing that "implementing busing plans accelerated the loss of white students from school districts); powell, *supra* note 14, at 779

B. FEDERAL LAW'S FAILED ATTEMPTS TO DESEGREGATE PUBLIC SCHOOLS

In *Plessy v. Ferguson*,[43] the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment did not forbid separate but equal railroad accommodations for blacks and whites.[44] The Court determined that the Constitution could not enforce "social, as distinguished from political equality."[45] Half a century later, in *Brown v. Board of Education (Brown I)*,[46] the Supreme Court reexamined the "separate but equal" doctrine and determined that separate educational facilities were inherently unequal.[47] The Court rejected the distinction between social and political equality, holding that comparable facilities failed to provide equal education opportunities for white and black schoolchildren.[48]

In *Brown v. Board of Education (Brown II)*,[49] the Court stated that school boards must desegregate school systems "with all deliberate speed."[50] Given little guidance, however, the lower courts were unable to overcome school closings, legislative resistance, vouchers enabling white parents to send their children to private schools, and simple inaction on the part of

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(commenting that "mandatory busing is perceived as the antithesis of strengthening communities, rather than as an effective step toward achieving integration"); *infra* notes 176-178 and accompanying text (arguing that effective integration policies must inculcate a sense of community). *But see* BELL, *supra* note 29, at § 7.6.4 n.24 (observing that in cost-benefit terms, busing should be an effective remedy); Gayl Shaw Westerman, *The Promise of State-Constitutionalism: Can It Be Fulfilled in* Sheff v. O'Neill?, 23 HASTINGS CONST. L.Q. 351, 402 (1996) (noting that "white flight" may occur as an immediate response to desegregation, but is not permanent).

43. 163 U.S. 537 (1896).

44. *See id.* at 544.

45. *Id.*

46. 347 U.S. 483 (1954).

47. *See id.* at 495.

48. *See id.* at 494 (explaining that separate school systems impede the educational and mental development of black children since separation of the races is perceived as denoting the inferiority of the black race). Recent surveys of attitudes reinforce the *Brown I* Court's reliance on the stigmatizing effect of segregation as a factor weighing against the constitutionality of "separate but equal." *See, e.g.*, JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 31 (1991) (inferring from black children's choice of integrated schools over better schools that the children recognize the difference between segregation and subordination).

49. 349 U.S. 294 (1955).

50. *Id.* at 301.

school districts.[51] Although the Supreme Court repeatedly expressed impatience with the deliberate pace of desegregation programs,[52] it was not until *Swann v. Charlotte-Mecklenburg Board of Education*[53] that the Court provided specific guidelines for removing the vestiges of segregated school systems.[54]

In *Keyes v. School District No. 1*,[55] the Court concluded that segregative intent was sufficient to establish de jure segregation despite the presence of an "allegedly logical, racially neutral" policy supporting segregated schools.[56] One year later, however, the Court determined that the presence of de jure segregation in one school district did not automatically warrant an interdistrict remedy.[57] Invoking the tradition of local control over the operation of schools, the Court in *Milliken v. Bradley* rejected the argument that busing programs could cross district lines without a showing of de jure segregation in

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51. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.9 (4th ed. 1991); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 232-71 (1994) (discussing state resistance to the *Brown* decisions); Liebman, *supra* note 18, at 1574-75 (noting that "vague" guidance provided by early decisions may have exacerbated resistance).

52. *See* Carter v. West Feliciana Parish Sch. Bd., 396 U.S. 290 (1970) (per curium) (reversing a lower court decision allowing a one-semester delay in the implementation of a desegregation order); Green v. School Bd. of New Kent County, 391 U.S. 430, 439 (1968) (emphasizing the need for remedial plans "realistically to work *now*"); Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 234 (1964) (stating that the "time for mere 'deliberate speed' ha[d] run out"); Goss v. Board of Educ., 373 U.S. 683 (1963) (invalidating a component of desegregation plan that permitted children to transfer schools in order to obtain majority status).

53. 402 U.S. 1 (1971).

54. *See id.* at 22-31 (enumerating racial balancing, majority-to-minority transfers, alteration of attendance zones, and transportation of students as permissible remedial measures in cases of de jure segregation).

55. 413 U.S. 189 (1973).

56. *Id.* at 210. The Court emphasized that the distinguishing characteristic between de jure and de facto segregation was one of intent. *See id.* at 208.

57. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974) (stating that an interdistrict remedy is warranted if there has been an interdistrict violation). The Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), impacted the analytical framework for future desegregation cases. In declining to grant public education the status of fundamental right, the Court established rational-basis scrutiny as the appropriate level of analysis in responding to claims of educational discrepancy. *See id.* at 40. Under state constitutions, by contrast, any infringement on the fundamental right to an education is subject to strict judicial scrutiny. *See, e.g.*, *infra* note 130 (noting the distinction between education under Connecticut and federal constitutional law).

each affected district.[58] While upholding the constitutional right of blacks in Detroit to attend a "unitary" school system in that district,[59] the Court drew a rigid boundary between school districts for remedial purposes.[60] Reliance by the Supreme Court on the concept of a unitary school system presupposes that federal supervision is a temporary measure designed to return control to local officials as soon as the school system is in compliance with the requirements of the Equal Protection Clause.[61]

The Court in *Freeman v. Pitts*[62] relied on this distinction between unitary status and integration to hold that once "any current imbalance is not traceable, in a proximate way, to the prior violation," there is no longer any constitutional violation.[63] The Court attributed resegregation not to any state action, but to market forces outside the scope of judicial control.[64] The

58. *See* 418 U.S. at 741-45.

59. *See id.* at 746. The term "unitary" refers to the *Brown I* requirement that the dual system erected under the "separate but equal" doctrine be fully eradicated. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) (defining the goal of unitary status); Sussman, *supra* note 14, at 893-94 (criticizing the use of the "unitary" concept in federal desegregation cases).

60. *See* 418 U.S. at 741-43. In so doing, the Court rejected the trial court's conclusion that the state should be held vicariously responsible for the Detroit school district's unconstitutional policies, thereby permitting interdistrict remedies. *See id.* at 735-36. Justice White, in dissent, noted that "the *only* feasible desegregation plan involves the crossing of the boundary lines." *Id.* at 766 (White, J., dissenting) (quoting *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973)). Justice White also noted that political subdivisions may be required to reconfigure boundaries in response to constitutional violations. *See id.* at 777 (citing reapportionment cases); *see also supra* note 25 (discussing remedial implications of hypersegregation).

61. *See* Board of Educ. v. Dowell, 498 U.S. 237, 246-50 (1991). The factors used in determining whether discrimination persists, however, are currently assessed in a superficial manner. *See* Sussman, *supra* note 14, at 893 (discussing the factors identified in *Green v. County School Board*, 391 U.S. 430, 435 (1968), to assess whether school boards were conducting themselves in compliance with the Equal Protection Clause). As Part I.A demonstrates, however, racial discrimination comprises a far more complex set of motivations and interactions than that supposed by the Supreme Court's narrow inquiry into the good faith of a school district's official stance.

62. 503 U.S. 467 (1992).

63. *Id.* at 494.

64. *See id.* at 494-95. Similarly, Justice Stewart in *Milliken v. Bradley* attributed residential segregation in suburban Detroit to "unknown and perhaps unknowable factors." 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring). One of the difficulties with the "unitary" perspective is that it leads to confusion regarding the ultimate objective of school desegregation decrees. In *Freeman*, Justice Kennedy suggests that the ultimate purpose of desegrega-

Court, in *Missouri v. Jenkins*,[65] extended this logic to a plan to integrate schools by attempting to reverse "white flight."[66] The Court rejected the plan because violations had only occurred within the district.[67] While the Supreme Court's desegregation jurisprudence has thus narrowly circumscribed the situations permitting remedial action,[68] state courts continue to adhere to the *Brown* dictum that "[i]t is crucial for a democratic society to provide all of its schoolchildren with fair access to an unsegregated education."[69]

C. EDUCATION CLAUSE JURISPRUDENCE: EDUCATION REFORM THROUGH MINIMUM STANDARDS OF EFFECTIVENESS

The constitution of every state contains some kind of an education provision.[70] Although the location and specific lan-

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tion decrees is the return of school districts to local control, *see* 503 U.S. at 489-90, whereas a historical analysis suggests that the purpose of desegregation orders was to extirpate racial segregation, *see* Sussman, *supra* note 14, at 894.

65. 515 U.S. 70 (1995).

66. *See id.* at 96.

67. *See id.* at 92. The Court ruled that the employment of magnet schools to attract white students back to the city fell outside the permissible remedial scope where no intent to discriminate was shown. *See id.*

68. *See Milliken*, 418 U.S. at 767 (White, J., dissenting) (noting the Court of Appeals' observation in *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973), that failure to provide a remedy for severely isolated schools surrounded "by suburban school systems overwhelmingly white" conjured "haunting memories . . . of *Plessy v. Ferguson*") (alterations in original) (citations omitted); Liebman, *supra* note 18, at 1471 n.51) ("The reappearance of proto-'separate but equal' views among members of the federal judiciary, of a sort not publicly expressed from that quarter for decades, indicates the current legal fragility of school desegregation.").

69. Sheff v. O'Neill, 678 A.2d 1267, 1289 (Conn. 1996). *Cf.* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989) (noting the "immeasurable worth of education to our state and its citizens"). *See generally* powell, *supra* note 14, at 782-85 (arguing that the harms identified in *Brown I* require an approach to education that focuses on transformation through interaction between the dominant group and the minority groups).

70. *See* ALA. CONST. art. XIV, § 256, amend. 111 (authorizing a public school system); CAL. CONST. art. IX, § 1 (providing that "the Legislature shall encourage . . . the promotion of intellectual, scientific, moral, and agricultural improvement); CONN. CONST. art. VIII, § 1 (providing that "there shall always be free public elementary and secondary schools in th[is] state"); GA. CONST. art. VIII, § 1, ¶ 1 (requiring "adequate" public schools); MASS. CONST. pt. 2, ch. 5, § 2 (providing detailed guidelines for the legislature, including the duty to "cherish" education); MINN. CONST. art. XIII, § 1 ("thorough and efficient"); N.J. CONST. art. VIII, § 4, ¶ 1 ("thorough and efficient"); N.Y. CONST. art. XI, § 1 (requiring a system of free public schools); N.D. CONST. art. VIII, § 1 (providing for the "establishment and maintenance of a system of public

guage varies from document to document,[71] these provisions provide a textual basis for claims implicating the state's duty to provide an education.[72] Despite difficulties surrounding interpretation of education clauses, state courts have read these provisions to demand improvements in their educational system.[73] In the landmark case of *Robinson v. Cahill*,[74] for example, the New Jersey Supreme Court invalidated the state's property-tax based school finance system as failing to satisfy constitutionally mandated standards of educational opportunity.[75] While similar

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schools"). For a complete list, see Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 627-28 n.90 (defining an "education provision" as any segment of a state's constitution enabling or mandating the creation and maintenance of a school system).

71. The education provisions of the Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming constitutions all require that the schools be "uniform," "thorough," "efficient," "adequate," "sufficient," or some combination thereof. *See* Stark, *supra* note 70, at 628 & n.92. The constitutions of California and Iowa require their respective legislative bodies to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST. art. IX, § 1; IOWA CONST. art. VIII, § 1. Some provisions mandate a free system of education without further qualification. *See, e.g.*, MO. CONST. art. IX, § 1(a); NEB. CONST. art. VII, § 1. Others merely authorize the creation of a public school system. *See, e.g.*, MISS. CONST. art. VIII, § 201.

72. *See, e.g.*, *Sheff*, 678 A.2d at 1280 ("No statute, no common law precedent, no federal constitutional principle provides this state's schoolchildren with a right to a public education that is not burdened by de facto racial and ethnic segregation. The plaintiffs make no such claim.... The issue... is whether [plaintiffs] have stated a case for relief under our state constitution ....").

73. Justice Brennan's seminal 1977 article may have spurred state court vindication of education rights claims. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1150-53 (1993) (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 546 (1986), as influencing state courts' willingness to liberally construe constitutional rights). The constitutional basis for adequacy arguments permits courts to take the lead in generating reform. *See* Phil Weiser, *What's Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 751 (1994-1995) (arguing that to "effectuate meaningful educational reform, courts must (1) force a new consideration of the state's education[al] problems, (2) create a sense of urgency and crisis, and (3) provide legislators with political protection, or 'cover,' for enacting comprehensive reform").

74. 303 A.2d 273 (N.J. 1973).

75. In emphasizing that the funding scheme resulted in unequal allocation of education dollars, the *Robinson* court relied exclusively on the state

fiscal equity arguments met with early success in several states,[76] equalized financing alone failed to redress educational deficiencies.[77]

In recent years, litigants have shifted the focus away from funding equity and toward issues of the substantive quality of educational opportunities provided by the state.[78] These legal theories of educational opportunity find their basis in the standards of adequacy implicit in the education clauses of state constitutions.[79] Adequacy theories argue that education clauses

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constitution's education clause, which requires a "thorough and efficient" education. *See id.* at 294 (citing N.J. CONST., Art. VIII, § 4, ¶ 2).

76. *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 374-75 (1977) (holding that disparities resulting from the state's school financing scheme offended plaintiff's fundamental right to an equal educational opportunity). *But see* Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (ruling that the state's financing system satisfied the "baseline level of adequacy and uniformity" contemplated by the constitutionally mandated duty to create a general and uniform system of education). Finance equity theories developed largely in response to the variability in per-pupil spending resulting from the local tax revenue component of school financing schemes. While state and federal allocations can designate a fixed per-pupil amount, local revenue varies according to the financial strength of the tax base. *See* Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of* San Antonio Independent School District v. Rodriguez *in the State Courts*, 30 VAL. U. L. REV. 551, 554 (1996) (explaining the basis of "fiscal equity" theories).

77. *See* Missouri v. Jenkins, 515 U.S. 70, 77-83 (1995) (quoting Jenkins v. Misouri, 19 F.3d 393, 403 (8th Cir. 1994), which stated that student achievement in the Kansas City district remained below national norms despite a school system "that offers more educational opportunity than anywhere in America"); Sherry, *supra* note 23, at 183-84 (arguing that differences in achievement are not a function of "easily measurable (and easily, if expensively remediable) differences between schools"); *see also* notes 40-42 and accompanying text (suggesting that integration strategies are more effective than monetary strategies). *But see* Martha L. Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 398-99 (1991) (contending that resource allocation remains a strong predictor of outcomes).

78. Claims based on "legal adequacy" theories assert that "some students are not receiving adequate educations as measured by state-defined or other contemporary education standards." Paul Minorini, *Recent Developments in School Finance Equity and Educational Adequacy Cases*, ERS SPECTRUM, Winter 1994, 3 at 3. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 108-9 (1995) (defining adequacy arguments as those which evaluate the capacity of educational services to meet constitutional obligations, as opposed to equity-based arguments, which focus on quantitative differences in available resources); *infra* notes 185-201 and accompanying text (identifying the prerequisites for and components of an adequate education). Despite the contrast with equity suits, *see supra* note 76, "the two theories are not always clearly distinguishable in practice." Clune, *supra* note 20, at 481 (discussing generally adequacy suits).

79. *See supra* notes 70-73 and accompanying text (discussing education clauses); *infra* notes 80-91, 136-138 and accompanying text (providing an

impose an affirmative obligation on the state to identify and implement substantive capacities comprising a minimum standard of education.[80] Increasing emphasis in lawsuits on the obligations imposed by state education clauses has yielded substantive standards that resonate with the *Brown I* Court's admonition to treat education as "perhaps the most important function of state and local governments."[81]

For example, in *Rose v. Council for Better Education, Inc.*,[82] the Kentucky Supreme Court set forth guidelines outlining "a vision of an educational system consistent with the state's commitment to education."[83] The Kentucky court interpreted the state's commitment to education, embodied in the constitutional provision for "an efficient system of common schools,"[84] to mandate "equal educational opportunity"[85] with regard to specific substantive educational capacities.[86] Noting that the sole responsibility for executing this constitutional directive lies with the legislative branch, the court stated that any dele-

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overview of the basis for and reasoning in adequacy suits).

80. *See* Stark, *supra* note 70, at 627 (providing selected interpretations of education clauses); *infra* note 86 (giving one such interpretation).

81. *Brown I*, 374 U.S. 483, 493 (1954). This quotation is cited in several adequacy suits. *See, e.g.*, Opinion of the Justices, 624 So.2d 107, 158 (Ala. 1993); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993).

82. 790 S.W.2d 186 (Ky. 1989).

83. *Id.* at 212-213. *See generally* Weiser, *supra* note 73, at 768-72 (describing the Kentucky case).

84. KY. CONST. § 183.

85. 790 S.W.2d at 212. Paul Kahn has noted that equality and efficiency are usually thought of as antithetical and suggests that notions of fairness explain these decisions. *See* Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 466-67 (1996) (discussing the decision in *Rose*).

86. *See* 790 S.W.2d at 212. The court defined the fundamental right to educational adequacy to include seven capacities as minimum requirements: oral and written communications skills; sufficient knowledge of economic, social, and political systems to permit informed choices; understanding of governmental processes sufficient to understand issues affecting community, state, and nation; self-knowledge, including health and wellness; ability to appreciate cultural and historical heritage; sufficient training to be able to choose and pursue life work intelligently; and "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market." *See id.* The court ruled that this constitutional right to an adequate education was contemplated by the constitutional mandate of common schools. *See id.* at 213. The court also directed the General Assembly to provide funding sufficient to meet these requirements. *See id; cf.* McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516, 554-55 (Mass. 1993) (interpreting its education clause to require the same seven substantive standards).

gation of decision making authority to local boards must comport with constitutional requirements.[87]

Similarly, an Alabama Circuit Court found that Alabama's education system offered neither equal nor adequate opportunities to the state's schoolchildren.[88] The court issued a remedial order outlining the reforms necessary to meet constitutional and statutory requirements.[89] The order contained a set of performance standards aimed at ensuring the students' capacity to compete in the regional and national job market.[90] In its

87. *See* 790 S.W.2d at 216. Commentators have noted that the court sought to legitimate its decision on the basis of civic pride and common identity. *See* Weiser, *supra* note 73, at 760 (noting that the public and the legislature responded positively to the challenge). Other commentators also suggest that courts can play an instrumental role in shaping public agendas by grounding decisions in constitutionally protected public commitments. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE 131-33 (1991). This theory of constitutional interpretation supports expansive readings of education clauses. *See* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978) ("We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."); *cf.* Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 586 (1986) (book review) (author of *Sheff* majority opinion noting that constitutional interpretation must conform to changing context and circumstances).

88. *See* Opinion of the Justices, 624 So.2d 107, 110-11 (Ala. 1993). *Opinion of the Justices* includes an advisory opinion from the Alabama Supreme Court confirming the constitutionality of the Circuit Court of Montgomery County's decision in which it exhaustively explored the state's education system and held it unconstitutional on both adequacy and fiscal equity grounds. The lower court's order in the consolidated cases of *Alabama Coalition for Equity, Inc. v. Hunt* and *Harper v. Hunt* is included as an appendix to the advisory opinion. *See id.* at 110.

89. The Alabama constitution requires the state to "establish, organize, and maintain a liberal system of public schools." ALA. CONST. art. XIV, § 256, amend. III. The circuit court ruled that the section must "be liberally construed, with the view of effectuating the intention of its framers." 624 So.2d at 146. The court construed the term "liberal" to require a minimally adequate education, terming this "the only kind of system that conforms with a liberal reading of the constitutional text." *Id.* at 154. The order required that the state establish a foundational level of support to ensure that the special needs of economically and otherwise disadvantaged students would be met. *See id.* at 144-46.

90. *See id.* at 155. In a speech to the constitutional framers, the Superintendent of Education admonished that "[t]he only way to make Alabama able to support a public school system is to educate her people and they will become prosperous. This will have to come first, poverty or no poverty. There is not an example to the contrary in the history of mankind." *See id.* Similarly, the court in *Sheff* noted that the future economic strength of the entire state and its economy depended on its response to the plight of the urban poor. *See* 678 A.2d 1267, 1290 (Conn. 1996).

advisory opinion, the Alabama Supreme Court upheld the order, stating that the circuit court fulfilled its duty to interpret the constitution and requiring the legislature to follow its order.[91]

II. ANALYZING REMEDIAL STRATEGIES FOR AMELIORATING THE HARMS OF RESIDENTIAL SEGREGATION AND THE *SHEFF* COURT'S RESPONSE TO SEVERE RACIAL AND SOCIOECONOMIC ISOLATION

Previous attempts to address the interrelated problems of educational and residential segregation have inevitably focused on one to the detriment, and often exclusion, of the other. This omission results in large part from a failure to recognize that the socioeconomic realities attendant to racial isolation constrain choices and often undermine remedial efforts. While no state or federal case has attempted to address residential segregation as a precondition to meaningful educational segregation, several existing decisions provide useful illustrations of potential legal bases for developing remedial solutions for educational and residential isolation. These cases demonstrate that state constitutions provide a basis for ordering fair-share housing remedies and suggest that race-conscious housing strategies contribute significantly to achieving meaningful educational opportunities. Although *Sheff* provided a unique opportunity for combining insights regarding the interconnectedness of residential and educational isolation with state-constitutionally based analytical framework for compelling wide-ranging remedial solutions, the court ultimately failed to recognize that the link between race and poverty is inextricable for remedial purposes. As a result, the court failed to provide a remedial framework that encompasses both residential and educational integration, and instead deferred to legislative judgment regarding relief.

A. THE STATE-CONSTITUTIONAL REQUIREMENT OF FAIR-SHARE HOUSING

In *Southern Burlington County NAACP v. Township of Mt. Laurel* (*Mt. Laurel I*),[92] a plaintiff's group representing poor black and Hispanic residents[93] challenged municipal zoning

91. *See Opinion of the Justices*, 624 So. 2d at 110.

92. 336 A.2d 713 (N.J. 1975).

93. The plaintiffs included current, past, and future residents of Mt. Laurel. *See id.* at 717.

ordinances that restricted the plaintiffs' ability to obtain housing.[94] Plaintiffs offered evidence demonstrating that "[t]he general ordinance requirements . . . realistically allow only homes within the financial reach of persons of at least middle income."[95]

Mt. Laurel conceded that its zoning ordinance operated to exclude low- and middle-income housing but justified its policy by reference to the "fiscal interest of the municipality and its inhabitants."[96] The New Jersey Supreme Court struck down the zoning ordinance finding, the general welfare clause[97] of the state constitution imposed on municipalities an affirmative obligation to consider regional welfare when implementing their planning authority.[98] The court required each municipality to meet its "fair share" of the regional housing needs by zoning so as to provide realistic opportunities for the creation of low-cost housing.[99]

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94. *See id.* The social and historical context of this litigation is a microcosm of the sea change in residential living patterns that occurred throughout the United States in the post-World War II era. *See supra* note 19. In the decade from 1950 to 1960, the population of Mt. Laurel, an outer-ring suburb of Camden, nearly doubled. 336 A.2d at 718. The land use regulations in Mt. Laurel exemplified suburban attempts to stem growth through exclusionary zoning. *See id.* at 719-22. Though municipal zoning, at least initially, was intended to counteract "urban congestion and untrammeled growth," DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 2 (2d ed. 1994), communities began in the 1950s to employ "exclusionary zoning" to prevent the construction of housing affordable to low-income residents, *see id.* at 432 (defining "exclusionary zoning" as the practice of establishing minimum lot sizes, bedroom restrictions, or other mechanisms designed to ensure the maintenance of a high socioeconomic status in a particular community); *see also* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34 (1st Sess. 1969) (noting that suburban communities throughout the U.S. adopted exclusionary policies); NAOMI BAILIN WISH & STEPHEN EISDORFER, THE IMPACT OF THE *MT. LAUREL* INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS 14 (1996) (discussing antecedents to fair-share housing litigation).

95. 336 A.2d at 719.

96. *Id.* at 718. Although the case originally contained claims of racial exclusion, the court accepted the city's contention that the exclusionary policy was solely motivated by economic interests. *See id.* at 719.

97. The exercise of a state's police power must promote public health, safety, morals, or the general welfare. These requirements are inherent in constitutional provisions for substantive due process and equal protection of the laws. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (ruling that exercise of delegated authority is limited by general welfare considerations); *Mt. Laurel I*, 336 A.2d at 725-28 (discussing general welfare requirements).

98. *See Mt. Laurel I*, 336 A.2d at 727-28.

99. *See Id.* at 731-32. In mandating inclusionary zoning—i.e. the use of zoning to create realistic housing opportunities—the court recommended

In *Southern Burlington County NAACP v. Township of Mt. Laurel* (*Mt. Laurel II*),[100] the court revisited the issue of "fair share" housing in response to widespread non-compliance,[101] this time articulating specific obligations, providing incentives, and, to ensure compliance, establishing judicial oversight.[102] The court emphasized that the affirmative obligations set forth in the first decision might require incentives in order to make housing opportunities "realistic."[103] Rather than relying on "the inclination of developers to help the poor,"[104] the court required municipalities to take affirmative steps to induce development by augmenting inclusionary zoning measures with incentives and by providing subsidized set-asides.[105] New Jersey's legisla-

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measures such as small lot sizes without minimum square footage restrictions, tying industrial zoning to residential zoning so as to ensure decent housing for employees, and eliminating bedroom restrictions. *See id.* at 732. The court, however, did not provide any means of determining regional housing requirements, choosing to leave this to city administrators. *See id.* at 733.

100. 456 A.2d 390 (N.J. 1983).

101. *But see* G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 556 (1984) (arguing that there is no necessary correlation between the inclusionary zoning mandated in *Mt. Laurel I* and availability of low-cost housing).

102. *See Mt. Laurel II*, 456 A.2d at 442, 446-50 & 459.

103. *See id.* at 442.

104. *Id.* The court observed it is unrealistic to expect even a developer enthusiastic about assisting the poor to construct less profitable housing merely because the municipalities alter zoning regulations to permit it. *See id.*

105. *See id.* at 443-46. The term "inclusionary zoning" in *Mt. Laurel II* encompassed not only the requirement to provide realistic housing opportunities but also specific affirmative techniques for encouraging the construction of low and moderate-income housing in economically integrated developments. *See* Ford, *supra* note 17, at 1914 (describing the effect of the *Mt. Laurel* decisions); *see also* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1169 (1981) (distinguishing "inclusionary" measures from "anti-exclusionary" measures). The court focused specifically on "incentive zoning" and "mandatory set-asides." *See Mt. Laurel II*, 456 A.2d at 445-48. "Incentive zoning" refers to the practice of providing a bonus in the form of increased density permits as the amount of lower income housing increases. *See id.* at 445. "Mandatory set-asides" simply require that a certain proportion of a development be set aside for low and moderate income housing. *See id.* at 446. *See generally* Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369-84 (1995) (examining a range of inclusionary zoning techniques that have been employed by state and local governments). Alternative inclusionary techniques include zoning appeals legislation, which eradicates the presumption of validity for zoning actions that impede the provision of affordable housing, *see id.* at 370-72, and adoption of comprehensive land use plans at the state level, *see* Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1143

ture responded to these decisions by enacting the Fair Housing Act of 1985,[106] creating a state agency to oversee municipal implementation of the *Mt. Laurel* principles.[107]

Under the Fair Housing Act, the difficulties of imposing fair-share obligations on every city are mitigated through Regional Contribution Agreements (RCAs), in which municipalities can transfer a portion of its share of fair housing to another municipality.[108] RCAs were intended to minimize the likelihood that middle-class whites hoping to move out of the city would take advantage of the program to the detriment of poor minorities.[109] Unfortunately, these initiatives have had little success in enabling urban poor and minority populations to obtain the benefits of living in the suburbs.[110]

The *Mt. Laurel* decisions and subsequent legislation were driven by a recognition that exclusionary zoning perpetuates racial and socioeconomic segregation and thereby isolates minorities from opportunity structures, including education and

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(1995) (arguing that state level planning permits more effective remediation for the lack of low-income housing because it permits planners to accommodate concerns for transportation and job development). This latter type of inclusionary zoning plan best comports with the rationale underlying utilization of state-constitutional education clauses to provide more integrated education through alteration of residential segregation patterns. *See infra* Part III.A (setting forth remedial framework flowing from the logic of adequacy suits).

106. *See* N.J. STAT. ANN. §§ 52.27D.301-.328 (West 1986 & Supp. 1997). The Act required each "municipality to adopt and implement a housing plan that would address [its] fair share of the unmet regional need for" affordable housing. WISH & EISDORFER, *supra* note 94, at 5. The Act created a state agency, the New Jersey Council on Affordable Housing, authorized to determine fair-share obligations. *See id.*

107. Initial reactions to *Mt. Laurel II* were negative. The governor referred to the holdings as "communistic." *See* CALLIES, *supra* note 94, at 452. Although proponents of *Mt. Laurel II* criticized the act for abandoning "goals of economic and racial deconcentration," *id.* (quoting Fox, *The Selling Out of* Mt. Laurel: *Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORD. URB. L.J. 535, 572 (1988)), the court upheld the act, *see Hills Development Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986).

108. *See* Ford, *supra* note 17, at 1899-1900 (discussing operation of Fair Housing Act).

109. *See id.* at 1900-01 (explaining rationale underlying implementation of RCAs).

110. *See* WISH & EISDORFER, *supra* note 94, at 68-74 (reaching conclusion from empirical survey of *Mt. Laurel* program participants); *see also* CHARLES M. HAAR, SUBURBS UNDER SEIGE: RACE, SPACE AND AUDACIOUS JUDGES 167-69 (1996) (criticizing the *Mt. Laurel* decisions for skirting the issue of racial isolation and noting that avoidance of this issue was predicated on avoiding federal judicial review).

employment.[111] According to data collected by New Jersey's Affordable Housing Management Service, however, urban fair-share units remain predominantly minority, whereas suburban units remain largely white.[112] Commentators suggest that subtle discrimination, relative impoverishment, and relative lack of choice explain these disparities.[113]

B. ACHIEVING EDUCATIONAL ADEQUACY THROUGH RESIDENTIAL INTEGRATION

In contrast to *Mt. Laurel*, housing initiatives stemming from the case of *Hills v. Gautreaux*[114] have been highly successful for minority populations. In the *Gautreaux* case, the Supreme Court affirmed a lower court finding that the U.S. Department of Housing and Urban Development had aided and abetted racial segregation in the Chicago Housing Authority.[115] The decision was followed by a settlement which provided Section 8 certificates for use by black public housing residents in relocating to urban and suburban areas with black populations under 30%.[116] Studies have shown that the households that moved into predominantly white, middle-income suburbs have enjoyed dramatic benefits in employment and education.[117]

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111. *See* WISH & EISDORFER, *supra* note 94, at 14-18 (providing context for *Mt. Laurel* initiatives).

112. *See id.* at 70-74.

113. *See id.* at 72-76. For example, the state agency overseeing fair-share programs may set prices as high as 50% of median income, a prohibitive cost for many urban minorities. *See id.* at 72; *see also supra* notes 31-32 and accompanying text (observing that severe racial and socioeconomic isolation places severe internal limitations on mobility).

114. 425 U.S. 284 (1976).

115. *See id.* at 286-91. For an overview of the social movements underlying the practice of and legal rationale for exclusionary zoning, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 757-64 (1993).

116. *See* Gautreaux v. Landrieu, 523 F. Supp. 665, 672-83 (N.D. Ill. 1981) (approving the settlement of claims by consent decree), *aff'd*, 690 F.2d 616 (7th Cir. 1982).

117. *See* Rosenbaum et al., *supra* note 26, at 1553-54 (providing findings from Northwestern University study of *Gautreaux* participants); *see also* MASSEY & DENTON, *supra* note 19, at 231 (discussing the benefits of integration afforded by *Gautreaux* and other housing mobility programs); Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 506-11 (1995) (book review) (comparing Massey and Denton's cost-benefit analysis of the *Gatreaux* programs with those of other researchers). *But see* Richard H. Sander, Book Review, 44 J. LEGAL EDUC. 143, 150 (1994) (reviewing

Professor Rosenbaum's study of *Gautreaux* participants "strongly suggests that poor educational and vocational skills and opportunities are neighborhood-determined and can be improved when deprived people are permitted to move to better-served neighborhoods."[118] Urban to suburban movement permitted under *Gautreaux*'s race-conscious, metropolitan-wide program has also yielded salutary results in terms of minority educational achievement.[119] Empirical and anecdotal evidence demonstrates that low-income minority children who moved to the suburbs were more likely to be in school, in college-track courses, attend college, obtain quality employment, and experience increased social integration than their urban counterparts.[120] Salient characteristics explaining the success of the *Gautreaux* project include provision of housing counseling to explain the advantages and disadvantages of program participation and utilization of Section 8 housing certificates to circumvent barriers to mobility, such as discrimination and housing costs.[121] Despite the implementation of a metropolitan-wide remedial plan, levels of segregation in Chicago remain high.[122] The lack of large-scale impact can be explained, however, by the limited number of participants, numbering only 4500 from 1976 to 1993.[123]

AMERICAN APARTHEID) (contending that the benefits derived from the *Gautreaux* program are actually quite modest). For a bibliography of the vast literature on the *Gautreaux* program, see Roisman, *supra* at 507 n.140.

118. Roisman, *supra* note 117, at 508 (discussing Rosenbaum et al., *supra* note 26, at 1553); *see* RUSK, *supra* note 19, at 121 (noting the success of the *Gautreaux* program undermines arguments that minority failure stems from a 'culture of poverty'). Other studies also support the common-sense hypothesis that movement to better neighborhoods increases employment opportunities. *See* Roisman, *supra* note 117, at 508-09 nn.147-48 (citing George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What Is Its Promise?*, *in* HOUSING MOBILITY: PROMISE OR ILLUSION 7, 12-13 (Alexander Polikoff ed., 1995)).

119. *See* James E. Rosenbaum et al., *White Suburban Schools' Responses to Low-Income Black Children: Sources of Successes and Problems*, 20 URBAN REV. 28, 39-40 (1988) (discussing the impact of residential integration on educational achievement).

120. *See* Rosenbaum et al., *supra* note 26, at 1552-53 (drawing conclusions from quasi-empirical survey of *Gautreaux* participants).

121. *See* WISH & EISDORFER, *supra* note 94, at 72-73 (comparing success of *Gautreaux* project with that of *Mt. Laurel*). Federal Section 8 certificates subsidize rental of private-sector apartments. *See* Rosenbaum et al., *supra* note 26, at 1522 n.20.

122. *See* MASSEY & DENTON, *supra* note 19, at 224-25 (discussing the failure of *Gautreaux* remedies to significantly reduce high levels of residential segregation).

123. *See* Rosenbaum et al., *supra* note 26, at 1521-24 (explaining operation

Reliance on *Gautreaux*-type strategies in other metropolitan areas is limited by the narrow criteria necessary to trigger remedial action under federal law.[124] Without a showing of intentional discrimination, the federal courts are unable to fashion relief for even the most devastating segregation. The continuing failure to realize the promise of *Brown* in Northern cities[125] provides an impetus for exploring state-constitutional alternatives to federal anti-discrimination law, making *Sheff* an ideal case for development of a broader remedial framework.

C. *SHEFF V. O'NEILL*: THE REQUIREMENT OF AN "EQUAL EDUCATIONAL OPPORTUNITY"

1. The Affirmative Duty to Eradicate Segregation

In *Sheff v. O'Neill*,[126] the Connecticut Supreme Court interpreted that state's constitution to require access to an unsegregated educational environment.[127] The plaintiffs, Hartford schoolchildren, introduced evidence of "severe educational disadvantages arising out of their racial and ethnic isolation and their socioeconomic deprivation."[128] Responding only to the former claim, the court concluded that the existence of extreme racial and ethnic isolation in the public schools deprives schoolchildren of "a substantially equal educational opportunity," thereby requiring the state to take remedial action.[129]

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of *Gautreaux* program).

124. *See* Sander, *supra* note 30, at 921 (discussing potential for race-conscious desegregation strategies under federal law); *supra* text accompanying note 115 (stating the ruling in *Gautreaux*).

125. *See supra* note 19 (discussing persistence of hypersegregation in Northern cities).

126. 678 A.2d 1267 (Conn. 1996).

127. *See id.* at 1288. The court relied on the confluence of the state constitution's education and equal protection provisions. *See id.* at 1271; *see also supra* notes 131-133 and accompanying text (explaining textual basis for decision).

128. *Sheff*, 678 A.2d at 1271. Specifically, the plaintiffs asserted that the State was responsible for the de facto segregation between the Hartford and surrounding school districts, that the State perpetuated that segregation, that the State failed to provide the plaintiffs with an equal educational opportunity in comparison with surrounding school districts, and that the State failed to provide plaintiffs with a minimally adequate education, all in contravention of the state constitution. *See id; see also supra* note 4 (providing demographic overview of Hartford school system).

129. *See id.* at 1280-81. Though the court recognized that plaintiffs labored under the "dual burden" of poverty and racial segregation, it ruled that because poverty is not a suspect classification the plaintiff's claim did not

The court determined that the constitution imposes a duty upon the state to remedy educational deficiencies resulting from segregated conditions, even the though these conditions "neither were caused nor are perpetuated by invidious intentional conduct on the part of the state."[130] In reaching this holding, the court first observed that the education clause imposes an affirmative obligation on the state to provide a public education.[131] This fundamental right is augmented by Connecticut's unique equal protection clause, which expressly proscribes "subject[ion] to segregation."[132] The court then determined that in the important context of public education,

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implicate constitutional questions. *See id.* at 1287-88.

130. *Id.* at 1282. Reading the education clause as informed by the antisegregation clause, the court determined that extreme racial and ethnic isolation required the state to take remedial action. *See id.* at 1281. The court acknowledged "as a matter of federal constitutional law, that claimants seeking judicial relief for educational disparities pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution must prove intentional governmental discrimination against a suspect class." *Id.* at 1278-79. However, the Connecticut court also observed that the Federal Supreme Court decisions were largely informed by principles of federalism, *see id.* at 1279 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973)), as well as by the determination that no fundamental right to an education exists under the U.S. Constitution, *see id.* (citing 411 U.S. at 35). Neither of these strictures limited the Connecticut court, which analyzed the alleged infringement under strict scrutiny. *See id.* at 1286-87. *See generally* powell, *supra* note 14, at 758 (noting that federal intent standards do not bind state courts or policymakers).

131. The education clause of the Connecticut Constitution places an affirmative obligation on the state to provide "free public elementary and secondary schools." CONN. CONST. art. VIII, §1. In *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), the court had determined that the state's failure to adequately address school funding inequalities offended the fundamental right to a substantially equal educational opportunity stemming from this provision. *See id.* at 374. The defendants in *Sheff* urged that by "substantially equaliz[ing] school funding and resources," the state had fully satisfied its constitutional obligations. 678 A.2d at 1281.

132. The Connecticut Constitution states: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination . . . because of . . . race, [or] ancestry. . . ." CONN. CONST. art. I, § 20. Only New Jersey has a comparable constitutional provision: "No person shall . . . be segregated in the militia or in the public schools" because of race, religion, or national origin. N.J. CONST. art. I, § 5. *See Sheff*, 678 A.2d at 1281-82. Though it relied on the plain meaning of the antisegregation clause, the Connecticut court cited a Michigan case holding that state's equal protection clause "imposed an affirmative obligation on the state to prevent [racial] discrimination" irrespective of a showing of discriminatory intent or purpose. *Id.* at 1283 n.32 (citing Detroit Branch, NAACP v. Dearborn, 434 N.W.2d 444 (Mich. App. 1988), *appeal denied*, 447 N.W.2d 751 (1989)).

these provisions impose upon state officials a duty to provide an unsegregated educational environment.[133]

Plaintiffs also alleged that segregation deprived them of an adequate education.[134] The majority did not reach this claim, citing the sufficiency of its holding for remedial purposes.[135] The concurrence would have held, however, that the fundamental right to an education presupposes an "adequate" education.[136] The concept of adequacy, the concurring justice determined, is inconsistent with a racially segregated learning environment.[137] The concurrence thus found that severe racial isolation deprives the plaintiffs of both an adequate and an equal educational opportunity.[138]

2. The Scope of the Duty to Provide an Equal Educational Opportunity

The court reasoned that two state statutes—one establishing school district parameters coextensive with town boundaries and the other requiring that children attend school in the district where they reside—were the single most important factors in maintaining racial and ethnic disparities within the state's school districts.[139] Failure on the part of state officials to remedy these disparities did not differ for constitutional purposes from an earlier failure to address funding disparities.[140] The court determined that the state had not "fully satisfied its affirmative constitutional obligation to provide a substantially equal educational opportunity" by demonstrating it

133. The debate surrounding the 1965 Constitutional Convention provided ample support for the court's conjoined reading of the education and equal protection clauses. *See Sheff*, 678 A.2d at 1282-83. The court noted that when the constitution was amended to include the segregation clause in 1965, it remained unclear whether the holding in *Brown I* applied to de facto segregation and that the clause was inserted to express unequivocal opposition to the philosophy and practice of segregation. *See id.* at 1283-84 & nn.33-34.

134. *See id.* at 1271.

135. *See id.* at 1286.

136. *See id.* at 1292 (Berdon, J., concurring).

137. *See id.* at 1293.

138. *See id.* at 1292 n.2.

139. *See id.* at 1277-78. The court also noted that the state exerts control over schools in many respects, including curricula, standardized testing, graduation requirements, and attendance. *See id.* at 1273.

140. *See id.* at 1278 (citing *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977), which concerned the constitutionality of the state's education financing scheme).

had substantially equalized school funding and resources.[141] In addition, the constitution's education provision, as informed by its equal protection clause, required affirmative state action to remedy segregation in the states' schools.[142]

Despite the court's determination that "[i]t is crucial for a democratic society to provide all of its schoolchildren with fair access to an unsegregated education,"[143] the court refrained from granting equitable relief.[144] Citing separation of powers concerns, it left remedial determinations to the state legislature.[145] Nonetheless, the court admonished the legislative and executive branches to treat the matter with urgency, concluding that "a denial of constitutionally protected rights demands judicial protection."[146]

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141. *Id.* at 1281.

142. *See supra* notes 130-133 and accompanying text (discussing the court's central holding).

143. *Sheff*, 678 A.2d at 1289.

144. *See id.* at 1290.

145. *See id.* The court determined that "further judicial intervention should be stayed 'to afford the General Assembly an opportunity to take appropriate legislative action.'" *Id.* (quoting *Horton v. Meskill*, 376 A.2d at 359); *cf.* Opinion of the Justices, 624 So. 2d 107, 165-66 (Ala. 1993) (providing highly specific guidelines directing legislative action); *supra* notes 51, 87 (suggesting that courts can legitimate controversial remedial action by providing specific guidance).

146. *Sheff*, 678 A.2d at 1291 (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)). When a trial judge dismissed the case in 1995, Connecticut Governor John Rowland celebrated. *See Justice for Hartford's Schools*, BOSTON GLOBE, July 16, 1996, at A14 (noting the Connecticut Supreme Court's decision in *Sheff*). Some suburban school officials responded negatively to the *Sheff* opinion. One suggested that any proposal to bus students outside a suburban system would mean "a war on our hands." *Id.* Another official suggested that the Supreme Court's encroachment on local decision making was "an attack on the very founding principles of public education." *Id.* The governor blocked a $14 million bond needed to complete a partially constructed regional magnet school in response to the requests of a conservative state senator who supported him on key legislation during the past year. *See* Meredith Carlson, *Rowland's Block of School's Funding Criticized*, HARTFORD COURANT, Oct. 25, 1996, at B1.

On January 22, 1997, the Educational Improvement Panel presented 15 potential remedial solutions to the state legislature in order to meet the court's desegregation order. *See* Sheff *Panel Recommendations*, HARTFORD COURANT, Jan. 23, 1997, at A10. Significant measures included school choice, subsidized preschools, and tying construction money to integration goals. *See id.* Both the choice and construction proposals were deemed "controversial." *See id.*; *see also supra* note 51 (suggesting that lack of remedial guidance engenders opposition and noncompliance).

D. THE LIMITATIONS OF *SHEFF*'S "EQUAL EDUCATIONAL OPPORTUNITY": A RIGHT WITHOUT A REMEDY

The court's treatment of racial isolation as separable from adverse socioeconomic conditions substantially reduces the decision's efficacy for redressing the inequities in the state's education system. Because the court did not perceive the cyclical nature of racial and socioeconomic isolation, the decision failed to comport with the realities of hypersegregation.[147] By focusing exclusively on race, and failing to provide any remedial guidance, the court may have inadvertently exacerbated racial tensions, as by raising the specter of a return to busing. By carefully explicating the link between race and socioeconomics, the court could have provided much needed political cover for legislative development and implementation of multidistrict remedial measures.

1. The Limited Remedial Force of "An Equal Educational Opportunity"

Empirical research demonstrates that racial and socioeconomic isolation form mutually reinforcing and intractable impediments to educational achievement.[148] Racial segregation has a devastating effect on a minority student's long-term orientation to society.[149] The socioeconomic isolation attendant to racial segregation severely limits the possibility of escaping the harms of segregation, which are often multigenerational.[150]

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147. *See supra* notes 4 (providing demographic statistics for Hartford and surrounding school system) & 19 (defining hypersegregation).

148. *See supra* notes 31-34 and accompanying text (explaining how racial segregation concentrates poverty).

149. Segregation visits upon students "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.... The impact [of segregation] is greater when it has the sanction of the law." *Brown I*, 347 U.S. 483, 494 (1954). Although we now associate "force of law" with invidious discriminatory intent, the distinction between de jure and de facto segregation appeared much later. *Cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 200-01 (1973) (holding that state-imposed segregation in part of a school district may allow a finding of a dual system in the entire district). Professor powell has observed that "our language and our national consciousness about segregation have been shaped by the federal courts." powell, *supra* note 14, at 757. Under state constitutions, however, state action exists as a function of the affirmative obligations embodied in education clauses. *See supra* notes 130-133 and accompanying text (discussing the *Sheff* court's finding of an affirmative obligation to provide a public education).

150. *See Sheff*, 678 A.2d at 1293 (Berdon, J., concurring) (noting the "generational

Long-term isolation from the opportunity structures of job networks, quality education, health care, and adequate housing, and the attendant subjection to concentration effects,[151] thus frustrate attempts to achieve meaningful integration, as opposed to numerical desegregation.[152] Meaningful integration would attempt to ameliorate concentration effects by acknowledging the necessity of a comprehensive remedial program that encompasses multiple legal categories, rather than treating these problems as severable.[153]

The *Sheff* majority failed to specify any appropriate relief for racial segregation.[154] Instead, the court granted declaratory relief and retained jurisdiction to grant consequential relief in the event that legislative oversight proved ineffective.[155] While continuing jurisdiction is an appropriate response in the context of school-financing claims,[156] several factors militate against legislative oversight of racial integration. Virulent opposition to desegregation has historically frustrated legislative development of remedial measures.[157] The history of federal

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cycle" of segregation).

151. *See supra* notes 26, 32-36 and accompanying text (discussing opportunity structures and concentration effects). The term "concentration effects" captures the fact that severe isolation along several sociological axes leads to an exponential isolation from mainstream patterns of behavior, creating in segments of the inner city a "social milieu significantly different from the environment that existed in these communities several decades ago." WILSON, THE TRULY DISADVANTAGED, *supra* note 26, at 58.

152. *See supra* note 17 (distinguishing integration from desegregation); notes 37-38 and accompanying text (stating that interdistrict remedies alter perceptions).

153. *See infra* notes 208-219 and accompanying text (providing a pragmatic justification for a broad-based remedial plan); part III.A (offering an outline of an effective remedial program).

154. *See* 678 A.2d at 1290.

155. *See id.* The court followed this same methodology in an earlier case declaring the state's school financing scheme unconstitutional. *See id.* (citing Horton v. Meskill, 376 A.2d 359 (Conn. 1977)).

156. *See Horton*, 376 A.2d at 375-76 (noting existence of a legislative plan for school finance reform); *see also* Skeen v. State, 505 N.W.2d 299, 319 (Minn. 1993) (deferring to legislative judgment in allocation of financial resources). *But see* Enrich, *supra* note 78, at 143-55 (suggesting that equality-based solutions threaten the interests of wealthy school districts, permit too much leeway in quantitative comparisons, and ultimately fail to ameliorate disparities in achievement); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072-73 (1991) (arguing that legislatures fail to develop adequate remedies because property-rich districts exert disproportionate influence over the judicial process).

157. Judicial invocation of separation of powers concerns to justify deference to legislative oversight often operates as no more than an abdication to

desegregation jurisprudence vividly illustrates the need for vigilance in overseeing implementation of constitutionally required remedies. The Supreme Court's vague admonition to desegregate with "all deliberate speed" needlessly delayed, and eventually undermined, federal desegregation efforts.[158]

By failing to provide any remedial guidance, the *Sheff* court may have in fact inadvertently undermined the force of the decision. In reducing plaintiffs' claims to a question of racial demographics, the court implied that interdistrict busing or alteration of district boundaries will provide effective remedial solutions. On the contrary, busing engenders significant opposition and may exacerbate racial tensions.[159] Alteration of district boundaries provides an immediate, but similarly unsatisfactory, solution to the problems of segregation.[160] Effective remedial measures must not simply move students across district lines, but also address the conditions underlying persistent segregation.[161]

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majority preferences, which impedes the development and the implementation of constitutionally mandated remedial programs. *See* Johnson, *supra* note 27, at 1608-09 (arguing that white attitudes and racism are major obstacles to redressing the problems of segregation); *supra* note 107 (noting criticism of the New Jersey court for upholding Fair Housing Act as constitutional despite lesser degree of enforcement than mandated by the *Mt. Laurel II* decision); *cf. Unfulfilled Promises*, *supra* note 156, at 1078 (arguing that, in the context of school finance cases, courts that find in favor of plaintiffs are vulnerable to political influences). The reaction of Connecticut Democrats to the possibility of "race-baiting" on issues of busing and redistricting provides a vivid illustration of the low esteem in which these traditional remedies are held. *See* Matthew Daly, Sheff *Memo Stirs Capitol Tempers: GOP Cries Foul After Discovery*, HARTFORD COURANT, July 22, 1996, at A1 (discussing a report issued in response to *Sheff* in which Connecticut's Democratic leadership recommended that candidates take clear preemptory positions against these desegregation strategies).

158. *See supra* notes 51-52 and accompanying text (discussing opposition to federal desegregation programs); *supra* notes 73, 86-87 (examining courts' capacity to shape policy agendas by providing remedial guidance).

159. *See supra* note 42 (discussing limited receptivity to busing as remedy for racial segregation).

160. *See supra* notes 26, 60 (noting necessity of crossing extant boundaries); *infra* part III.B.1 (contending that effective remedial strategies must foster a sense of belonging).

161. Recent research indicates that educational segregation results in long-term segregation because blacks underestimate their ability to contend with racial tension and overestimate white resistance to integration. *See* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 533 (1994). Black students who experience integration in public schools are more likely to attend college, work, and live in integrated environments. *See* Braddock and McPartland, *supra* note 41, at 8 (observing that "minority segregation tends to be perpetu-

Normative arguments also militate in favor of remedial guidance. Courts should not, absent an express reservation, defer to legislative judgment regarding the proper scope of constitutional rights.[162] As a matter of institutional competency, the *Sheff* court had a duty not only to determine whether the legislature fulfilled its affirmative duties to the state's schoolchildren,[163] but also to specify the state's remedial obligations.[164]

2. The Limited Precedential Value of "An Equal Educational Opportunity"

Other state courts addressing claims of racial and socioeconomic segregation in violation of state obligations will undoubtedly look to *Sheff* as an instructive example.[165] While the *Sheff* court understandably referred to the unique role that the term "segregation" plays in the equal protection clause of the Connecticut Constitution,[166] this aspect of the court's reasoning needlessly detracts from *Sheff*'s precedential value. Ascribing

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ated over stages of the life cycle and across institutional settings"); *see also supra* part I.A (discussing how segregation impacts access to opportunity structures); *infra* part III.B (arguing that pragmatic, political, and legal considerations justify wide-ranging remedial measures, including housing integration).

162. While educational financing decisions are clearly the province of the legislature, it is the duty of the judiciary to interpret, construe, and give meaning to the text of the constitution. *See* Horton v. Meskill, 376 A.2d 359, 375 (Conn. 1977); *see also* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978) (en banc).

163. *See* Sheff v. O'Neill, 678 A.2d 1267, 1276 (Conn. 1996).

164. *See* Opinion of the Justices, 624 So. 2d 107, 145 (Ala. 1993) (stating that "constitutional obligations [under the education clause] cannot be avoided because of a lack of funding") (quoting McCarthy v. Manson, 554 F. Supp. 1275, 1304 (D. Conn. 1982), *aff'd*, 714 F.2d 234 (2d Cir. 1983); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) ("The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it.... This duty must be exercised even when... the court's view of the constitution is contrary to that of other branches, or even that of the public."). In *Rose*, the court set forth binding criteria of educational adequacy, *see id.* at 212-13, but left funding decisions to the discretion of the General Assembly, *see id.* at 216.

165. *See* Brief for Appellant at 23, NAACP v. State, (Minn. Ct. App. 1997) (No. C9-96-2439) (suggesting that plaintiffs in *NAACP v. State* intend to use *Sheff* as legal authority for their claim of unconstitutional racial segregation in the Minneapolis public schools); *see also Rose*, 790 S.W.2d at 210 (citing a case from another state to demonstrate that "courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system").

166. *See supra* notes 126-133 and accompanying text (detailing the court's reasoning).

independent significance to this term was not necessary to the holding that de facto segregation offends the fundamental right to an education.[167] In other cases, the term "efficient" alone, or in combination with "thorough," has been held to impose an affirmative duty to provide a minimally adequate education to all students.[168] The concurrence extended this logic to embrace integration as a component of adequacy.[169] In addition to these textual bases for adoption of an adequacy rationale, other legal and policy considerations support the use of adequacy for redressing claims of racial and socioeconomic segregation.

The original scope of *Brown v. Board of Education*[170] did not contemplate a distinction between de facto and de jure segregation.[171] Rather, the Court recognized that segregated schools were inherently unequal and that racial isolation posed a barrier to educational achievement that was exacerbated by government imprimatur.[172] The later distinction between de facto and de jure segregation[173] is irrelevant under state-constitutional fundamental rights analysis. While the Supreme Court's refusal to recognize education as a fundamental right limited the scope of judicial relief in segregation cases,[174] fundamental rights analysis allows state courts to depart from the federal intent standard.[175]

Courts, including the *Sheff* majority, have also relied on policy grounds to support integrated schools.[176] These decisions

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167. *See Sheff*, 678 A.2d at 1292 n.2 (noting that adequacy provides a separate constitutional ground for remedying segregation); *cf. Rose*, 790 S.W.2d at 215 (establishing specific standards of adequacy solely on the basis of the education clause).

168. *See supra* notes 70-75 and accompanying text (explaining textual basis of adequacy suits); *supra* note 85 (observing that fundamental notions of fairness may inform adequacy decisions as much as text).

169. *See supra* notes 136-138 and accompanying text (detailing the reasoning of the concurring opinion).

170. 347 U.S. 483 (1954).

171. *See Sheff*, 678 A.2d at 1284 n.37 (observing that when the state's constitution was amended to include the segregation clause, it was unclear whether *Brown I* was limited to de jure segregation); *see also* notes 43-48 and accompanying text (reviewing basis of the *Brown I* decision).

172. *See Brown I*, 347 U.S. at 494-96.

173. *See supra* notes 55-56 and accompanying text (distinguishing de facto and de jure segregation).

174. *See supra* notes 23 and 57 (discussing effect of *Rodriguez* decision on desegregation cases).

175. *See supra* notes 130-131 (discussing fundamental rights analysis under state law).

176. Citing to language in *Brown I*, the *Sheff* court stated that education is " 'a

underscore the importance of education by citing its capacity to inculcate values and shape the future economic welfare of society. For example, the Supreme Court recognized that denial of a common education jeopardizes the inculcation of shared values necessary to a democratic political system.[177] Alternately, a New Jersey opinion highlighted the impact of educational quality on that state's future economic welfare.[178]

That the *Sheff* court's reliance on Connecticut's unique equal protection clause detracts from the holding's precedential value is well illustrated in a current case being brought by the NAACP against the State of Minnesota.[179] In that case, plaintiff class brought suit alleging that racially and socioeconomically segregated conditions perpetuated by the state violate the students' fundamental right to an adequate education.[180] Whereas the *Sheff* court predicated its analysis on a prior decision identifying a fundamental right to an "equal educational opportunity,"[181] the Minnesota plaintiffs based their claim on an earlier decision conferring a fundamental right to a

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principle instrument in awakening the child to cultural values, [and] in preparing him for later professional training.' " *Sheff*, 678 A.2d at 1289 (quoting *Brown I*, 347 U.S. at 493). The court further stated that "[i]f children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society." *Id.* at 1285 (quoting Jenkins v. Township of Morris Sch. Dist., 279 A.2d 619, 634 (N.J. 1971)). *See also supra* note 87 (giving public policy rationales for holding education systems unconstitutional).

177. The Court stated that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." Plyler v. Doe, 457 U.S. 202, 221 (1982).

178. Abbott v. Burke, 575 A.2d 359, 411-12 (N.J. 1990). The court observed that deprivation of a quality education affects not only the state's social fabric, but also impacts the entirety of the state and its economic basis; the economic-well being and technical and professional acumen of the urban poor is "an integral part of our future economic strength. . . . So it is not just that their future depends on the State, the state's future depends on them." *Id.*

179. *See* Brief for Appellant at 22-26, NAACP v. State (Minn. Ct. App. 1997) (No. C9-96-2439) (discussing the inapplicability of *Sheff*'s analysis to a claim brought under Minnesota's constitution). Because the Minnesota Supreme Court dismissed an appeal of certified questions as premature and issued an order remanding for trial, no respondent's brief was filed. *See* NAACP v. State, No. C9-96-2439 (Minn. Jan 21, 1997) (order denying petition for accelerated review for the purpose of dismissing appeal as premature).

180. Plaintiffs base their claim on the existence of districting statutes similar to those of Connecticut.

181. *See supra* note 1 (detailing the plaintiffs' allegations).

"uniform and adequate" education.[182] Although the claim is structurally synonymous with that in *Sheff*, the state argued that the Connecticut Court's reasoning is inapposite under Minnesota law, both because the court did not reach the adequacy issue[183] and because of its reliance on the unique equal protection provision.[184] The *Sheff* court's failure to explicitly identify integration as a component of an adequate education thus detracts from both its remedial and precedential force.

III. TAKING ADEQUACY SERIOUSLY: EDUCATION CLAUSES MANDATE INTEGRATED EDUCATIONAL ENVIRONMENTS

An alternative line of reasoning from the one adopted by the Connecticut Supreme Court in *Sheff* offers a more effective solution to the problem of persistent socioeconomic and racial segregation. By interpreting education clauses to independently mandate adequate and, by extension, integrated educational environments, courts can simultaneously address isolation from opportunity structures and subjection to concentration effects, phenomena that impede educational achievement. Equating adequacy with integration corrects several failures of existing desegregation jurisprudence: it does not require proof of invidious discriminatory intent, rejects the distinction between socioeconomic and racial segregation, and compels wide-ranging remedial measures. By combining salutary features of existing integration strategies, educational adequacy can serve as a catalyst for achieving meaningful integration. As the discussion below demonstrates, legal, political, and pragmatic considerations justify this approach, despite its controversial implications.

A. EDUCATION CLAUSES INDEPENDENTLY MANDATE ADEQUATE AND, BY EXTENSION, INTEGRATED SCHOOLS

The concurring opinion in *Sheff* reasoned that the fundamental right to an education confers a correlative right to an adequate education.[185] This comports with other decisions that

182. *See* Skeen v. State, 505 N.W.2d 299, 311 (Minn. 1993).

183. *See supra* note 1 (noting that the *Sheff* court didn't reach merits of adequacy claim).

184. *See supra* notes 132-133 and accompanying text (discussing substance and history of the provision).

185. *See supra* notes 136-138 and accompanying text (discussing concur-

have employed adequacy theories to redress disparities in education financing.[186] The *Sheff* concurrence additionally asserted, however, that adequacy entails not only threshold standards of educational quality, but also presupposes integrated educational facilities.[187] Reliance on this theory would have resolved the tension between the *Sheff* court's holding and the lived reality of Hartford schoolchildren.[188]

Even if current school districts were fully integrated, statistical segregation would remain high.[189] Only movement across extant boundaries can significantly reduce present levels of isolation.[190] Recognizing integration as a component of adequacy comports with empirical analysis demonstrating that spatial isolation by race and class forms an insurmountable barrier to educational achievement.[191] Because education clauses impose an affirmative obligation on states to act, rather than refrain from acting, absence of discriminatory intent fails as a defense to segregation.[192] As the *Sheff* court noted, this affirmative duty entails more than a legislative scheme that furthers an important nonracial interest, such as local control of schools.[193]

Once integration is identified as a component of adequacy, general welfare considerations compel courts to mandate *Mt. Laurel*-type remedies.[194] Since educational adequacy precedes economic welfare and enhances students' capacity for exercising the duties of citizenship,[195] states have a responsibility to en-

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ring opinion).

186. *See supra* part I.C (exploring education clause litigation).

187. *Sheff*, 678 A.2d at 1294 (Berdon, J. concurring) ("Education entails not only the teaching of reading, writing and arithmetic, but also includes the development of social understanding and racial tolerance.").

188. *See supra* notes 128-129, 160-161 and accompanying text (noting the court's decision to treat racial and socioeconomic isolation as separable).

189. *See supra* note 25 (explaining the protracted nature of segregation in urban schools).

190. *See* Rivkin, *supra* note 18, at 285 (suggesting that because of extreme isolation, only movement across existing boundaries through busing or housing remedies will produce desegregation); *see also* Orfield, *supra* note 36, at 826 n.12 (noting that in 1993 only 10.9% of black students and 5.1% of Latino students attended nonmetropolitan public schools).

191. *See supra* note 37 (noting strong correlation between racial segregation and poor quality schools).

192. *See supra* notes 57-60, 64-67 and accompanying text (noting that federal intent standard effectively precluded relief for segregation).

193. *See Sheff*, 678 A.2d at 1288.

194. *See supra* part II.A (discussing *Mt. Laurel* initiatives).

195. *See supra* notes 86-90 and accompanying text (recognizing these in-

sure that each student has access to an integrated educational environment.[196] Although busing and redistricting achieve efficient numerical desegregation,[197] only alteration of segregated residence patterns confer a sense of membership in the larger community.[198] Combining the salutary features of *Mt. Laurel*, *Gautreaux*, and the more traditional desegregation cases[199] yields a more effective solution.[200] The three prongs of inclusionary zoning, private-market subsidies, and county-wide school districts maximize demographic redistribution while minimizing costs.[201]

Although *Mt. Laurel*'s initiatives have failed to benefit minority populations,[202] inclusionary zoning is necessary to ensure a minimum supply of affordable housing throughout a region.[203] As the *Mt. Laurel II* decision indicated, without the use of specific inclusionary techniques, municipalities are unlikely to adopt appropriate zoning ordinance amendments.[204] While inclusionary techniques ensure a minimum store of affordable housing, the *Mt. Laurel* experience shows that predicating the right to fair housing on a wealth classification alienates the minority population that constitutes the real victim of residential segregation.[205] Although the New Jersey court avoided federal

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terests as informing adequacy decisions); *infra* notes 207-217 and accompanying text (suggesting that capacity of integrated education to foster community justifies housing remedies).

196. *See supra* notes 134-138 (noting that integration is a logical extension of fundamental right to adequate education). Imposing this responsibility on the state comports with interpretive theories suggesting that courts should expansively interpret constitutionally protected public interests. *See supra* note 88.

197. *See supra* note 42 (discussing pros and cons of busing).

198. *See supra* notes 38, 177-178 (noting that a fundamental role of education is to promote economic welfare and common values).

199. *See supra* part II.A & B (discussing remedial programs employed as a result of these decisions).

200. Redistricting links cities to suburbs, which is a necessary condition to stemming white-flight away from minority school districts. *See* RUSK, *supra* note 19, at 34-38.

201. *See supra* notes 25, 60 (noting that only redistribution can alleviate the problems of segregation).

202. *See supra* notes 110-113 and accompanying text (discussing shortcomings of *Mt. Laurel* initiatives and offering explanations).

203. *See Mt. Laurel II*, 456 A.2d 390, 445 (N.J. 1983) (permitting lower courts to require inclusionary zoning to ensure incorporation of fair-share housing into local planning schemes).

204. *See id.* at 444-45.

205. *See* Abigail T. Baker, Book Note, *Suburbs Under Seige: Race, Space and Audacious Judges*, 30 U. RICH. L. REV. 1093, 1100-03 (1996) (reviewing

review on equal protection grounds, it also undermined the efficacy of its decisions. Invocation of education clauses as an independent constitutional basis for remedial action, however, also circumvents the problem of potential federal overruling.

The second two remedial prongs concern the issue of population redistribution. States should implement programs analogous to the Section 8 subsidies employed in *Gautreaux*, thereby affording access to better-served communities despite cost barriers.[206] Finally, redistricting, or *de*-districting, provides an effective mechanism for stemming the flow of the middle-class to far flung suburban communities, while also assisting in the goal of achieving meaningful integration, rather than numerical desegregation.[207]

B. PRAGMATIC, POLITICAL, AND LEGAL CONSIDERATIONS JUSTIFY COURT-IMPOSED HOUSING REMEDIES

1. Pragmatic and Political Justifications

The pragmatic justification for housing remedies relies on complementary empirical and policy justifications. Quantitative analysis demonstrates that integrated learning environments improve scores for both white and minority students.[208] The achievement gap between these groups, moreover, decreases in integrated settings.[209] Increased funding associated with desegregation programs does not explain this result.[210] Rather, segregation by race and socioeconomic status nega-

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HAAR, *supra* note 110) (discussing Professor Haar's argument that *Mt. Laurel* did not pay enough attention to racial issues).

206. *See supra* text accompanying notes 116 and 121 (explaining operation of Section 8 program).

207. *See* RUSK, *supra* note 19, at 34-38 (discussing the relation to metro-wide school systems to integrated communities).

208. *See supra* Part I.A (noting effect of integrated schools on test scores).

209. *See supra* notes 40-41 and accompanying text (citing research on achievement in integrated schools).

210. *See* powell, *supra* note 14, at 790 (noting that even where greater funding is allocated to segregated schools, achievement declines). The failure of Connecticut's previous attempts to address poor achievement levels in the Hartford schools through equalized funding supports this contention. *See also* Sheff v. O'Neill, 678 A.2d 1267, 1294 (Conn. 1996) (discussing low levels of academic achievement in Hartford public schools, including a 94% rate of failure to meet the state's mathematics standards among sixth graders); *supra* notes 40-42 (suggesting that integration is more effective than monetary solutions for raising minority test scores).

tively affects expectations and "communicates to students in both subtle and explicit ways the lower standards in their schools."[211]

Policy considerations reinforce these empirical arguments. As the Alabama court recognized, the quality of education provided to a state's children directly impacts that state's attractiveness to business and industry.[212] Integration also fosters a sense of belonging and increases the feeling of connection with the larger community.[213] Capacities developed through experience in the social environment, including schools, act as an unconscious influence on the formation of character.[214] In this sense, an adequate education is one that inculcates in students "social understanding and racial tolerance."[215] Integrated education is thus based on the commonsense hypothesis that interaction will transform race relations and yield a more fully functioning participatory democracy.[216] This hypothesis is supported by research showing not only that integrated learning environments improve academic performance, but also foster long-term integration in residential and

211. powell, *supra* note 14, at 790.

212. *See* Opinion of the Justices, 624 So. 2d 107, 126-27 (Ala. 1993) (discussing testimony of business leaders concerning importance of education); *supra* Part I.A (discussing correlation between education and long-term benefits). The relation of adequacy requirements to opportunity structures appears clearly in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). The court's emphasis on the "equal opportunity to have an adequate education," *id.* at 211, coupled with its definition of "adequacy" as requiring at a minimum one of its goals being to provide "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently . . . [and] to compete favorably with their counterparts in surrounding states," *id.* at 212, indicates that segregation, to the extent that it acts as a barrier to "sufficient training," renders education inadequate.

213. *See* powell, *supra* note 14, at 792; *see also* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 13 (1989) (discussing the meaning of belonging in American society).

214. *See* JOHN DEWEY, DEMOCRACY AND EDUCATION 139 (1916) (discussing the educational value of experience).

215. Sheff v. O'Neill, 678 A.2d 1267, 1294 (Conn. 1996) (Berdon, J., concurring).

216. *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1687 (1990) (describing the democratic theory of John Dewey as based on the hypothesis that focusing efforts to fully develop social intelligence on the underprivileged will yield a society more capable of resolving social problems). The transformative capacity of integrated educational settings lessens concerns that desegregation merely means assimilation by minorities into the dominant culture. *See* powell, *supra* note 14, at 774-78 (discussing the distinction between assimilation and integration as a transformative goal).

employment settings.[217] In order to receive an education adequate to an increasingly plural society,[218] children must be educated in a nonsegregated environment.[219]

Political considerations also justify court imposition of remedial solutions. Because housing remedies defy traditional notions of local control over schools and challenge vested interests, courts need to provide political cover for legislative implementation of remedial programs.[220] Failure to provide specific guidance invites noncompliance and prolonged litigation.[221] As the Kentucky experience demonstrates, adequacy suits provide a window of opportunity for altering perceptions concerning the common interest in educational adequacy.[222]

2. State-Constitutional Education Clauses Mandate Imposition of Housing Remedies

Housing remedies are not discretionary, but compelled.[223] That is, education clauses impose duties on the state that are

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217. *See* Orfield, *supra* note 36, at 868-69 (attributing changes in attitudes toward schools to participation in the larger community); Braddock & McPartland, *supra* note 41 (providing an overview of research on positive long-term academic and social consequences of desegregation). *But cf.* Missouri v. Jenkins, 515 U.S. 70, 2061 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."). Justice Thomas failed to distinguish between innate and descriptive inferiority. The inadequacy of segregated educational facilities is not innate, but rather a function of our national legacy of slavery and racism.

218. *See* sources cited *supra* notes 85 and 87 (arguing that unless interpreted to address current realities, constitutional rights will atrophy).

219. *Sheff*, 678 A.2d at 1293 (Berdon, J., concurring).

220. *See supra* notes 86-87 (noting effectiveness of this strategy in Kentucky case).

221. *See supra* notes 156-157 and accompanying text (suggesting likelihood of this result in Connecticut). New Jersey's experience with school finance reform provides an instructive example of these shortcomings. Since the New Jersey Supreme Court first decided in 1973 that its system of school financing violated the state's education clause, the state has experienced a protracted history of judicial pronouncement and legislative resistance. *See generally* Nicolas S. Warner, Note & Comment: *Toward Parity in Education:* Abbott v. Burke *and the Future of New Jersey School Systems*, 5 TEMP. POL. & CIV. RTS. L. REV. 183, 186-95 (1996) (giving a history of the New Jersey decisions and accompanying legislation).

222. *See supra* notes 75, 86-87 (referring to Kentucky example to contend that courts should shape legislative agenda by reference to expansive constitutional interpretation).

223. *Cf.* HAAR, *supra* note 110, at 177-78 (arguing for judicial intervention where other branches, due either to malfeasance, pressure, or nonfeasance, fail to uphold affirmative constitutional obligations); *Unfulfilled Promises*, *su-*

structurally synonymous with those of the general welfare clause. In each instance, alteration of extant housing patterns are a necessary condition precedent to satisfaction of the textual obligation.

Because negative externalities associated with spatial isolation by race cannot be eradicated without residential integration, such integration serves as a precondition to educational adequacy.[224] The centrality of education to a democratic scheme of government, as represented in the uniquely affirmative nature of education clauses, underscores the correlation between educational access and long-term access to opportunity structures. Just as exclusionary zoning implicates the general welfare clause of state constitutions, districting statutes defining attendance on the basis of residency have the foreseeable consequence of restricting minority populations to segregated schools, thereby fostering long-term racial and economic segregation.[225]

While courts in states other than New Jersey have been unwilling to undertake general welfare analysis in order to mandate inclusionary zoning policies, education clauses provide a structurally parallel alternative for ameliorating the inequities of spatial segregation by race and socioeconomic status. By altering extant boundaries that have the foreseeable effect of perpetuating segregated conditions, adequacy theory achieves the goals of the *Mt. Laurel* courts[226] while simultaneously adhering to the mandate of providing a meaningfully adequate educational opportunity.

C. APPLYING ADEQUACY REASONING TO HYPERSEGREGATED COMMUNITIES

The *Sheff* majority failed to reach the merits of plaintiffs' adequacy claim because they deemed it unnecessary for resolution of the case. The court should have recognized, however, that the education clause confers a correlative right to an ade-

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pra note 156, at 1092 (concluding that courts abdicate from constitutional duties when they defer to legislative judgment regarding the meaning of education clauses).

224. *See supra* notes 31-36 and accompanying text (suggesting that the intractable nature of racialized poverty precludes educational achievement absent meaningful remedial action).

225. *See supra* note 5 and accompanying text (stating that districting statutes were the single most important factor in causing persistent segregation in Hartford).

226. *See supra* part II.A (discussing scope of general welfare constraints on state action).

quate education. Empirical evidence suggests that integration is a precondition to attainment of an adequate education, both in terms of promoting academic achievement and of fostering of racial tolerance. By defining threshold standards of adequacy to include integrated educational environments, the court would have given substance to the fundamental right embodied in the constitution's education clause and developed a remedial framework capable of redressing hypersegregation in Hartford's schools.

Hartford's schools remain overwhelmingly minority, while those in surrounding communities remain overwhelmingly white. Only movement across extant boundaries can redress these disparities. The state of Connecticut has the highest teacher salaries in the nation and the best student-teacher ratio.[227] Nonetheless, the students of Hartford continue to be denied an adequate education. Although state officials have recognized the inequalities present in the state's system, the legislature has failed to respond effectively.[228] Connecticut's unique segregation provision underscores the inherent inequality of segregated educational experiences. The *Sheff* court's reliance on this language, however, detracted from the precedential and remedial force of the decision. Future courts should instead interpret the affirmative obligation to provide an adequate and, by extension, integrated education in light of general welfare considerations. This will allow courts to generate and enforce wide-ranging remedial measures.

CONCLUSION

Forty years after *Brown*, racial segregation persists as a significant impediment to minority achievement in urban Northern schools. Extreme spatial isolation by race and socioeconomic status has resisted increasingly limited federal desegregation efforts and continues to foreclose minority access to opportunity structures. While housing remedies have in some instances successfully reduced barriers to educational achievement, no court has attempted to redress educational segregation through residential integration.

227. *See* Sheff v. O'Neill, 678 A.2d 1267, 1295 n.7 (Conn. 1996) (Berdon, J., concurring) (quoting the trial court's findings of fact).

228. *See id.* (noting that previous desegregation plans have not contained any compliance mechanisms); *see also supra* notes 6, 146 and accompanying text (listing limited proposals for compliance with the *Sheff* ruling).

In holding that failure to eradicate racial segregation violates the state's affirmative obligation to provide an equal educational opportunity, the Connecticut Supreme Court reaffirmed the notion that segregated educational environments are inherently unequal. The *Sheff* court's recognition that race and poverty intersect to produce systematic exclusion from opportunity structures provided a necessary first step toward educational adequacy. The court failed, however, to develop an analytical framework capable of compelling remedial solutions. Although future courts faced with segregation suits will undoubtedly look to *Sheff* as an instructive example, the majority's failure to address segregation in terms of adequacy undermines the remedial and precedential value of the decision.

This Note proposes an alternative line of reasoning that recognizes integrated communities as a precondition to educational adequacy. State courts should follow existing precedent in construing education clauses to impose a threshold standard of adequacy. Identifying integration as a basic component of adequacy comports with an understanding of education as integral to the instillation of common values and goals. Moreover, because of the strong correlation between residential and educational segregation, adequacy arguments justify housing remedies as an effective means of producing adequate schools. In order to achieve meaningful integration, states need to move beyond remedies that exacerbate racial tensions and engender protracted opposition, and toward a conception of education predicated not only on the rhetoric, but the reality, of our common destiny.